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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

CHARLES HAINS and DANIEL MCSHANE,
Petitioners,

v.

JOSEPH MICHAEL LOGSDON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 12, 2008

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QUESTION PRESENTED

A panel of the Sixth Circuit reversed the District Court's grant of qualified immunity to the defendants in regard to their arrest of the plaintiff, a repeat criminal trespasser at an abortion clinic. The plaintiff has admitted a long history of protests, arrests, and convictions, most often of criminal trespassing, at the abortion clinic in question. The Sixth Circuit held that the defendants lacked probable cause to arrest because, after the officers were dispatched to respond to the clinic's complaints of plaintiff's criminal trespass, they "refused to listen" to exculpatory statements offered by plaintiff's fellow protestors.

The Sixth Circuit's ruling begs that the following question be addressed by this Court:

Does the accusation of a known, credible victim establish probable cause to arrest?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

CHARLES HAINS and DANIEL MCSHANE

represented by Peter J. Stackpole and Richard Ganulin, Assistant City Solicitors, Room 214, City Hall, 801 Plum Street, Cincinnati, Ohio 45202; (513) 352-3350

Respondents (plaintiff and appellant below):

JOSEPH MICHAEL LOGSDON

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CITATIONS FOR OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is reported as *Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007). App. 1-23. The order of the Court of Appeals denying the defendants' petition for rehearing en banc was not reported. App 47-48. The District Court's order granting defendants' motion to dismiss was not reported. App. 26-46.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its original decision on July 6, 2007. The Court of Appeals denied the petitioners' request for a rehearing on banc on December 13, 2007. 28 U.S.C. 1254 confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

UNITED STATES CONSTITUTION AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION AMENDMENT XIV (Section One):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Joseph Michael Logsdon has long been a protestor against local Cincinnati abortion clinics. He has a history of arrests and convictions, including eight previous convictions for criminal trespass, related to his activism. App. 27.

This case arises from two separate incidents at Cincinnati Women's Services, a local abortion clinic. Cincinnati Women's Services (CWS) has a history of being the target of trespass offenders, including Logsdon, many times. App. 38. Logsdon has been a regular presence at CWS. He is familiar with the clinic director, Debi Jackson, and he understands that he is not welcome on the property. App. 27.

An altercation between Logsdon and the director of CWS

The first incident occurred on October 28, 2003. Logsdon was stationed on the public sidewalk in front of the clinic. He placed a sign on a fence that borders the clinic's parking lot. App. 27. The sign read: "GOD HAS A PLAN FOR YOUR BABY." Disturbed by the sign, a CWS patient informed the clinic director of it. App. 3-4. The director removed the sign from the fence and walked toward the clinic. App. 27-28. Logsdon verbally challenged the director and repeatedly demanded that she return the sign to him. Logsdon then marched onto the clinic property and physically took the sign from the director. App. 28.

The director called the Cincinnati police department and reported that Logsdon had committed a crime. She requested police assistance. App. 28.

Officer Hains responded to the director's call. Based on the phone call from the director, he arrested Logsdon for criminal trespass and disorderly conduct. A fellow protestor attempted to explain what happened, but Officer Hains told her, "Tell it to the judge." App. 28.

A conversation between Logsdon and a patient of CWS

The second incident occurred on June 18, 2004. A woman parked her car in the CWS parking lot. Logsdon wanted to speak with her. Not willing to stay on the public sidewalk, Logsdon moved closer and spoke to the woman through a chain link fence. After

several minutes, the woman went inside CWS. App. 28.

Someone from CWS then called the Cincinnati police department and reported that Logsdon had trespassed. App. 28-29.

Officer McShane responded to the call. Based on the information received from the clinic, Officer McShane arrested Logsdon who was still there. Again, a fellow protestor attempted to explain what happened, but Officer McShane did not act on that information. App. 29.

The aftermath

Logsdon was convicted of criminal trespass from the first incident. App. 29-30. The conviction was reversed on appeal by an intermediate appellate court. The appellate court determined that Logsdon was privileged to be on the clinic property because he was retrieving a protest sign. App. 30. Following his successful appeal, he filed a federal complaint.

In the complaint, Logsdon asserts that the officers lacked probable cause to arrest him. Specifically, he claims that before arresting him the officers should have listened to his fellow protestors. The officers moved to dismiss. The district court granted the motion. The court held that probable cause existed based upon the phone calls from the clinic. The district court emphasized that complaints of citizen witnesses who are also victims are given great weight when determining the existence of probable cause. App. 35-40.

Logsdon appealed. On July 6, 2007, the Sixth Circuit Court of Appeals reversed, finding that the officers did not act prudently or reasonably. The court concluded that the officers should have listened to the statements of fellow protestors for potentially exculpatory information before arresting Logsdon. App. 15.

The officers filed a petition for rehearing en banc. On December 13, 2007, the panel voted to deny the petition for rehearing. App. 47-48.

This Petition follows.

REASONS FOR GRANTING CERTIORARI

The theory in this case is simple: once an officer receives an accusation from a known, credible victim, probable cause exists. This Court should allow this petition because it will mark a brighter line for law enforcement officers. Officers should not be required to conduct quasi-trials in order to determine if they have probable cause to arrest. But if this Court allows the reported decision of the Sixth Circuit to stand, that is exactly what will be achieved. United States Supreme Court Rule 10.

In granting the defendants' motion to dismiss, the district court observed:

> Having reviewed this matter, the Court finds the arresting officers, in relying on testimony of a reliable witness and finding Logsdon at the scene of the alleged trespass, reasonably

> believed that Plaintiff committed trespass. App. 35.

The court emphasized that the report came from the apparent victim of the crime in question. As such, the report was "entitled to great weight when determining the existence of probable cause." App. 37-38. The district court rejected plaintiff's argument that the officers should have acted on the attempted explanations of Logsdon's fellow protestors, reasoning:

> Officer Hains was entitled to give little credence to Logsdon's fellow protestors and encourage them to take their testimony to the judge. Hains had a legal foundation for the arrest based on probable cause, and Hains was not required to conduct a quasi-trial in order to determine that Logsdon's trespass was technically privileged. App. 39.

The Sixth Circuit reversed, stating:

> In the course of initially assessing whether probable cause to arrest Plaintiff existed, Defendants respectively "turn[ed] a blind eye" to potentially exculpatory evidence when they refused to listen to the witnesses at the scene. App. 13.

But probable cause already existed. The accusations of the director of CWS and, later, an employee of CWS, were not anonymous. The officers who responded had no reason to doubt the truthfulness or reliability of the putative victims. And when they arrived, Logsdon was present, which

provided corroboration. Once an officer receives an accusation from a known, credible victim, probable cause exists.

The Seventh Circuit agrees with this approach. In *Beauchamp v. Noblesville*, the Court of Appeals provided that the complaint of a "single witness or putative victim alone is generally sufficient to establish probable cause to arrest." *Beauchamp v. Noblesville,* 320 F.3d 733, 743 (7th Cir. 2003).

Perhaps the most useful explication of this approach comes from Circuit Judge Garth of the Third Circuit Court of Appeals. In his concurring opinion to *Wilson v. Russo*, Circuit Judge Garth wrote:

> In probable cause analysis, it is the *reliability of the witness* (or victim) who has provided an identification of the assailant that is the focal point of the inquiry. It is not the reliability of the evidence provided in tandem with that individual's identification, which may be inconsistent with such an identification. As a result, the majority confuses a lack of reliability in an eyewitness with evidence that, at most, tends to exculpate the identified individual of wrongdoing and therefore simply is inconsistent with the victim's identification. Inconsistent or contradictory evidence may cut against a putative defendant's guilt at trial, but it cannot render invalid—i.e. eliminate the probable cause necessary to obtain an arrest warrant—a positive identification by an eyewitness who either a police officer or a magistrate deemed to

be reliable. *Wilson v. Russo*, 212 F.3d 781, 793 (3rd Cir. 2000).

Circuit Judge Garth concluded, "Accordingly, I part company with the majority opinion at the point where the majority seeks to distort the probable cause analysis to the point of virtually requiring trial-type proof at the very threshold stage of criminal investigation." *Wilson v. Russo*, 212 F.2d 781, 793 (3rd Cir. 2000).

Like the majority opinion in *Wilson v. Russo*, the panel of the Sixth Circuit Court of Appeals distorts the probable cause analysis to the point that police officers must conduct mini-trials at the very threshold of criminal investigation. Accordingly, this Court should allow this petition to bring clarity to the probable cause analysis and to resolve conflicts between the Courts of Appeals. United States Supreme Court Rule 10.

CONCLUSION

Based on the foregoing, the petitioners submit that the reported decision of the Sixth Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts and involves an important federal question that should be settled by this Court. Accordingly, petitioners request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4085

[Filed July 6, 2007]

JOSEPH MICHAEL LOGSDON, *Plaintiff-Appellant*,

v.

CHARLES HAINS and DANIEL MCSHANE, *Defendants-Appellees*.

Appeal from the United States District Court
for the Southern District of Ohio
at Cincinnati. No. 05-00541
S. Arthur Spiegel, Sr., District Judge.

Argued: April 26, 2007.

Decided and Filed: July 6, 2007.

Before: SUHRHEINRICH, CLAY, and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas W. Condit, Cincinnati, Ohio, for Appellant. Richard Ganulin, City Solicitor's Office for the City of Cincinnati, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Thomas W. Condit, Cincinnati, Ohio, for Appellant. Richard Ganulin, City Solicitor's Office for the City of Cincinnati, Cincinnati, Ohio, for Appellees.

OPINION

CLAY, Circuit Judge.

Plaintiff, Joseph Michael Logsdon, appeals the district court's order granting a Rule 12(b)(6) motion brought by Defendants, Charles Hains and Daniel McShane, and dismissing Plaintiff's § 1983 suit and related claims. Plaintiff alleged violations of his rights under the First, Fourth, and Fourteenth Amendments to the U.S. Constitution, and asserted various state law claims for violations of the Ohio Constitution and state common law. For the reasons that follow, we **REVERSE** the district court's order and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

Plaintiff has long been "an active member of the pro-life movement" who, specifically, engages in sidewalk counseling and peaceful protest outside abortion clinics in and around Cincinnati, Ohio.[1] (J.A.

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[1] Because we review the district court's grant of a Rule 12(b)(6) motion to dismiss, we rely solely upon the allegations contained

at 8) Plaintiff alleges that he has "never threatened or committed any act of violence" while counseling or protesting. (*Id.* at 9) Plaintiff admits, however, that on several occasions, he crossed the property line of the abortion clinics to communicate with clinic patients and hand them literature. Accordingly, Plaintiff has been charged with and convicted of criminal trespass in the past. Yet, Plaintiff claims that "he has always treated judges and prosecutors with respect, served his sentence(s) with dignity, and complied with any related court orders." (*Id.*) Plaintiff characterizes himself as a "regular presence" at Cincinnati Women's Services ("CWS"), an abortion clinic in Cincinnati. Plaintiff admits that, on the basis of his experience at CWS and with its President, Debi Jackson ("Jackson"), his "regular presence" is an unwelcome presence. (*Id.*)

Plaintiff's § 1983 suit arose from two separate encounters with the City of Cincinnati police. The first occurred October 28, 2003 on the public sidewalk outside CWS, where Plaintiff protested and counseled clinic patients. On that day, Plaintiff hung a sign on the neighboring property's fence. The sign said, "God has a plan for your baby," and listed a telephone number. (J.A. at 10) A clinic patient complained about

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in Plaintiff's complaint. In ruling on Defendants' motion to dismiss, the district court took judicial notice of the transcripts of the criminal proceeding against Plaintiff arising out of his October 2003 arrest. *Logsdon v. Hains,* No. 1:05-CV-00541, 2006 WL 1793243, at *2 n. 1 (S.D. Ohio June 27, 2006) (unpublished). That transcript was made a part of the record on appeal. Having reviewed the transcript, we find no need to take judicial notice inasmuch as the facts set forth therein are, in pertinent part, co-extensive with the factual allegations in Plaintiff's complaint.

Plaintiff's sign and, apparently in response to the patient's complaint, Jackson removed Plaintiff's sign from the fence and "walked toward the CWS clinic with the intention of destroying it." (*Id.*) Plaintiff demanded that Jackson return his sign, to no avail. At that point, Plaintiff walked onto CWS property and took back his sign from Jackson, thereafter "promptly return[ing] to the public sidewalk." (*Id.*) Jackson subsequently contacted the City of Cincinnati Police.

Defendant Charles Hains ("Hains"), an officer of the Cincinnati Police Department, responded to the scene and placed Plaintiff under arrest. Defendant Hains did not have a warrant for Plaintiff's arrest and did not observe the incident at issue. Additionally, Defendant Hains refused to listen to a witness's account of the incident, admonishing her to "Tell it to the judge." (J.A. at 11) Ultimately, Defendant Hains arrested Plaintiff for criminal trespass and disorderly conduct. Plaintiff remained in custody for approximately four hours, after which time he was released on bond. Pursuant to these charges, Plaintiff appeared in Hamilton County Municipal Court on several occasions along with counsel. The court conducted a bench trial on May 10, 2004, finding Plaintiff guilty of criminal trespass, but acquitting him of disorderly conduct. On appeal heard April 22, 2005, the Hamilton County Court of Appeals reversed Plaintiff's conviction for criminal trespass upon a finding that Plaintiff was privileged to enter CWS property to retrieve his sign. Over the course of these proceedings, Plaintiff incurred attorney fees in excess of $10,000, and avers that he suffered various other

harms and indignities.[2] Plaintiff avers that Defendant Hains acted in "malicious and/or reckless disregard of [Plaintiff's] clearly established statutory and constitutional rights." (J.A. at 12)

The second encounter took place on June 18, 2004. That day, Plaintiff again counseled clinic patients and protested on the public sidewalk near CWS. In order to communicate with a clinic patient arriving in the CWS parking lot that day, Plaintiff walked into an adjacent public park and spoke to the patient through a chain link fence. Plaintiff describes the conversation as "not hostile" and says it "lasted for several minutes" before the clinic patient entered the clinic. (J.A. at 13) Following that encounter, an employee at CWS called the Cincinnati Police to complain of trespass by Plaintiff. Defendant Daniel McShane ("McShane"), an officer of the Cincinnati Police Department, responded and placed Plaintiff under arrest for criminal trespass. Plaintiff states that McShane had no warrant for Plaintiff's arrest and refused to listen to a witness's account of the incident. Additionally, McShane was apparently not present at the scene during Plaintiff's encounter with the clinic patient. Defendant McShane filed criminal trespass charges against Plaintiff, and Plaintiff was held at the Hamilton County Justice Center for four hours that day. On this trespass charge, Plaintiff also appeared several times before the

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[2] It appears that Plaintiff initially filed suit against Defendant Hains in the Hamilton County Court of Common Pleas on October 27, 2004, asserting various state law claims. However, Plaintiff filed a voluntary notice of dismissal without prejudice and reserved his right to re-file those claims.

Hamilton County Municipal Court along with counsel before the court ultimately dismissed the charge on November 3, 2004. Plaintiff states that he incurred over $2,000 in attorney fees in relation to this charge. Plaintiff alleges that Defendant McShane "performed maliciously and/or in reckless disregard of [Plaintiff's] clearly established statutory and constitutional rights." (J.A. at 14)

On December 8, 2005, Defendants filed a motion to dismiss Plaintiff's § 1983 complaint for failure to state a claim. Therein, Defendants set forth five bases for granting their motion to dismiss: (1) that Plaintiff failed to plead a federal constitutional claim; (2) that qualified immunity would shield Defendants from suit; (3) that issue preclusion applied; (4) that there existed an insufficient justification for pendent jurisdiction; and (5) that Plaintiff failed to adequately plead state tort claims. Plaintiff responded with a motion to convert Defendants' motion to dismiss into a proceeding for summary judgment and for discovery, as well as a response in opposition to Defendants' motion to dismiss.

Ultimately, the district court granted Defendants' motion to dismiss. In its order dismissing Plaintiff's case, the district court reasoned as follows:

> [Plaintiff's] Fourth Amendment claims clearly relate to his arrests, and his First Amendment claims are grounded in the theory that his arrests impeded his freedom of expression and of assembly. Should the arrests be supported by probable cause, then none of Plaintiff's constitutional claims survive. Having reviewed

> this matter, the Court finds the arresting officers, in relying on testimony of a reliable witness and finding [Plaintiff] at the scene of the alleged trespass, reasonably believed that Plaintiff committed trespass. Accordingly the Officers had probable cause.

Logsdon, 2006 WL 1793243, at *4. Additionally, the district court found that even if it erred in finding no constitutional violations, Defendants were each protected by the doctrine of qualified immunity. *Id.* at *8. Specifically, the district court opined that Defendant "Hains was clearly reasonable in arresting [Plaintiff,]" and that Defendant McShane "at worst . . . reasonably misapprehended the law governing the circumstances he discovered." *Id.* Plaintiff timely appealed the district court's order.

DISCUSSION

I. PLAINTIFF'S FEDERAL CONSTITUTIONAL CLAIMS

A. Standard of Review

We review *de novo* the district court's grant of a Rule 12(b)(6) motion. *Petty v. County of Franklin, Ohio,* 478 F.3d 341, 345 (6th Cir. 2007); *Bloch v. Ribar,* 156 F.3d 673, 677 (6th Cir. 1998). Reviewing the district court's decision on a motion to dismiss, we construe the plaintiff's complaint liberally, in plaintiff's favor, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas,* 537 F.2d

857, 858 (6th Cir. 1976)). If, after doing so, we find that the plaintiff failed to state a claim for relief, we will affirm the district court's grant. *Id.* However, "[t]he district court's dismissal of a civil rights complaint on a 12(b)(6) motion is scrutinized with special care." *Id.* Finally, we review *de novo* the district court's finding of qualified immunity. *Bloch,* 156 F.3d at 677 (citing *O'Brien v. City of Grand Rapids,* 23 F.3d 990, 998 (6th Cir. 1994)).

B. Qualified Immunity and Plaintiff's Fourth Amendment Claims

Plaintiff contends that the district court erred in dismissing his § 1983 suit inasmuch as his complaint states a claim for violations of his Fourth Amendment right to be free from unreasonable searches and seizures. The district court granted Defendants' Rule 12(b)(6) motion to dismiss, finding that Defendants each had probable cause to arrest Plaintiff and, at any rate, were protected by qualified immunity. Having "scrutinized with special care" the district court's order dismissing Plaintiff's claims, we hold that the district court erred in granting Defendants' motion to dismiss Plaintiff's Fourth Amendment claims.

Qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). As a threshold matter, we first consider whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz,* 533

U.S. 194, 201 (2001). If, upon review, we determine that the officer in question violated the claimant's constitutional rights, we proceed to a second question: whether at the time of the alleged violation that right was "clearly established." *Id.* Accepting Plaintiff's factual allegations as true and drawing all reasonable inferences in his favor, we find that the district court erred in dismissing Plaintiff's Fourth Amendment claims against Defendants Hains and McShane. We approach the question within the framework of qualified immunity analysis, and first conclude that, on the facts alleged, Defendants Hains and McShane each violated the Fourth Amendment in arresting Plaintiff absent a warrant inasmuch as they lacked probable cause. *See Saucier,* 533 U.S. at 201.

The Fourth Amendment protects the right of individuals to be free from improper arrest and detention. U.S. Const. amend. IV ("The right of people to be secure in their persons . . . against unreasonable seizures . . . shall not be violated."). "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed," *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004), and the "validity of the arrest does not depend on whether the suspect actually committed a crime." *Michigan v. DeFillippo,* 443 U.S. 31, 36 (1979). Accordingly, "[i]n order for a wrongful arrest claim to succeed under § 1983, a plaintiff must prove that the police lacked probable cause." *Fridley v. Horrighs,* 291 F.3d 867, 872 (6th Cir. 2002) (citing *Painter v. Robertson*, 185 F.3 d 557, 569 (6th Cir. 1999)).

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Henry v. United States,* 361 U.S. 98, 102 (1959); *see also Beck v. Ohio,* 379 U.S. 89, 91 (1964); *Illinois v. Gates,* 462 U.S. 213, 238 (1983). The inquiry "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest," *Devenpeck,* 543 U.S. at 152, where supported by "reasonably trustworthy information." *Beck,* 379 U.S. at 91. No overly-burdensome duty to investigate applies to officers faced with the prospect of a warrantless arrest. In initially formulating probable cause, they need not "investigate independently every claim of innocence." *Gardenhire v. Schubert,* 205 F.3d 303, 318 (6th Cir. 2000). And after the officer determines, on the basis of the facts and circumstances known to him, that probable cause exists, the officer has no further duty to investigate or to search for exculpatory evidence. *Ahlers v. Schebil,* 188 F.3d 365, 371 (6th Cir. 1999); *Criss v. City of Kent,* 867 F.2d 259, 263 (6th Cir. 1988). However, the initial probable cause determination must be founded on "both the inculpatory *and* exculpatory evidence" known to the arresting officer, *Gardenhire,* 205 F.3d at 318 (emphasis in original); *Estate of Dietrich v. Burrows,* 167 F.3d 1007, 1012 (6th Cir. 1999), and the officer "cannot simply turn a blind eye toward potentially exculpatory evidence." *Ahlers,* 188 F.3d at 372; *see also id.* at 371 (noting that officers may not "make hasty, unsubstantiated arrests with impunity"); *Fridley,* 291 F.3d at 873 ("The officer may not ignore information which becomes available in the course of routine investigations."). "In general, the existence of probable cause in a § 1983 action presents a jury question,

unless there is only one reasonable determination possible." *Fridley,* 291 F.3d at 872 (quotation marks omitted).

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance on state law." *DeFillippo,* 443 U.S. at 36. Defendants each arrested Plaintiff for criminal trespass.[3] In Ohio, an individual commits criminal trespass by "[k]nowingly enter[ing] or remain[ing] on the land or premises of another" absent "privilege to do so." Ohio Rev. Code § 2911.21(A)(1). The Ohio Code defines "privilege" as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." *Id.* at § 2901.01(A)(12). Ohio courts construe the lack-of-privilege requirement as an element of the offense of criminal trespass, and not an affirmative defense. *State v. Newell,* 639 N.E.2d 513, 514 (Ohio Ct. App. 1994) ("In a criminal trespass charge, the state is required to prove lack of privilege."); *State v. Keegan,* 588 N.E.2d 928, 929 (Ohio Ct. App. 1990) (classifying absence of privilege as an "essential element of trespass"). Accordingly, Defendants had probable cause to arrest Plaintiff if, on the basis of the facts known to them, they could

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[3] Defendant Hains additionally charged Plaintiff with disorderly conduct. Yet, on appeal, the respective parties do not rely on the disorderly conduct charge to establish or to challenge the constitutionality of Plaintiff's arrest. Accordingly, we examine each of Plaintiff's claims with reference to the criminal trespass charge alone.

reasonably conclude that Plaintiff knowingly entered CWS's property without privilege.

At the time Defendant Hains arrested Plaintiff, Hains knew only that Jackson called the Cincinnati Police to complain that Plaintiff had entered the CWS property.[4] Upon arriving at the scene, Defendant Hains refused to listen to an eyewitness account of the incident, directing the witness to "Tell it to the judge." Although Plaintiff admits that he knowingly entered the premises of CWS to retrieve his sign on October 28, 2003, on the facts alleged in Plaintiff's complaint, Defendant Hains did not observe this conduct, nor did Plaintiff admit such conduct to Defendant Hains at the scene. Similarly, the facts and circumstances known to Defendant McShane, as alleged in Plaintiff's complaint, were that "someone at CWS called the City of Cincinnati Police Division alleging that [Plaintiff] had trespassed." (J.A. at 13) Like Hains, McShane did not witness the alleged trespass. Also like Hains, Defendant McShane declined to hear a sidewalk counselor's "attempted explanation" of the incident. (*Id.* at 12-13)

Reading Plaintiff's complaint in the light most favorable to him, Defendants failed to reasonably determine whether they had probable cause. In the course of initially assessing whether probable cause to arrest Plaintiff existed, Defendants respectively

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[4] Expressly, Plaintiff's complaint alleges, "Jackson proceeded to call the City of Cincinnati Police Division to report that [Plaintiff] had committed a crime and to seek police intervention." (J.A. at 10)

"turn[ed] a blind eye" to potentially exculpatory evidence when they refused to listen to the witnesses at the scene. A prudent officer must draw reasonable conclusions from the facts and circumstances known to him as supported by "reasonably trustworthy information." *See Beck,* 379 U.S. at 91. It appears that Defendants deliberately excluded from a totality of known facts and circumstances information that might bear on the accuracy, reliability, or trustworthiness of the report that Plaintiff had trespassed on CWS's property. To that extent, Defendants did not act as "prudent officer[s]" and their conclusions cannot be deemed "reasonable." Rather, potentially conflicting explanations from these eyewitnesses would have informed Defendants' probable cause analyses, giving them reason to question the reliability of reports that Plaintiff had committed criminal trespass.[5] *Cf. Ahlers,* 188 F.3d at 370. Although our Circuit's precedent "does not mandate that law enforcement operatives should conduct quasi-trials as a necessary predicate to the warrantless arrest" of suspects, *Painter,* 185 F.3d at 571 n. 21, it does require that warrantless arrest follow consideration of the totality of the circumstances reasonably known to the arresting

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[5] It is worth noting that on the facts alleged in Plaintiff's complaint, the CWS employee reporting Plaintiff's alleged criminal trespass on the second occasion did not actually witness the event, but rather relied upon the report of a CWS client. The presumption of reliability often afforded eyewitness accounts would therefore not apply with equal force to the CWS employee reporting the second incident. *See Ahlers,* 188 F.3d at 370 (noting that "since eyewitnesses' statements are based on firsthand observations, they are generally entitled to a presumption of reliability and veracity").

officers. Because officers initially assessing probable cause to arrest may not off-handedly disregard potentially exculpatory information made readily available by witnesses on the scene, there is a set of facts consistent with the pleadings in which Defendants violated Plaintiff's Fourth Amendment rights. *See Gardenhire,* 205 F.3d at 318; *Ahlers,* 188 F.3d at 371-72; *cf. Painter,* 185 F.3d at 571.

At oral argument, Defendants argued that officers need not entertain *any* exculpatory evidence to the contrary when they receive a call from a "reliable source" reporting purportedly criminal activity. Defendants' argument is undermined as a result of Defendants' failure to offer a persuasive explanation of what constitutes a "reliable source." For purposes of this discussion, we shall limit our definition of reliable source to someone with respect to whom there is no apparent reason to question the person's reliability. Probable cause assessments depend on the totality of the circumstances known to the officer. Here, the totality should have encompassed readily available eyewitness accounts, but did not because Defendants refused to listen. We express no opinion as to whether, where the totality of the circumstances consists solely of a report of criminal activity from a reliable source, probable cause exists to arrest. That case is not before us.[6] Even assuming that CWS constitutes a "reliable

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[6] On some conceivable set of facts, a call from a reliable source, standing alone, may be sufficient to establish probable cause. Although not directly on point, *Ahlers* is instructive. There, a victim's "accusation that she had been sexually assaulted by [the § 1983 plaintiff], standing alone, was sufficient to establish

source" here, Defendants deliberately disregarded available evidence and, consequently, failed to reasonably formulate probable cause. Accordingly, Defendants' argument has no merit in this case.

Our conclusion is only that sufficient facts have been alleged to avoid dismissal on the pleadings. We conclude that Plaintiff has stated a claim that Defendants lacked probable cause to arrest Plaintiff and, therefore, that they violated Plaintiff's Fourth Amendment rights.

We next consider whether Plaintiff's rights were "clearly established." *Saucier,* 533 U.S. at 207. On this point, we determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. Qualified immunity cannot be invoked to shield an officer from liability where "in light of pre-existing law, the unlawfulness" of his conduct was "apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Pre-existing law need not address the very question at hand; rather, "[t]he contours of the right must be sufficiently clear." *Center for Bio-Ethical Reform, Inc. v. City of Springboro,* 477 F.3d 807, 830 (6th Cir. 2007). In June 2004, "the law was clearly established that, absent probable cause to believe that an offense had been committed, was being committed, or was about to be committed, officers may not arrest an individual." *Gardenhire,* 205 F.3d at 313 (quoting *Dietrich,* 167 F.3d at 1012) (internal quotation marks omitted).

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probable cause," where there was no apparent reason to question the reliability of that accusation. 188 F.3d at 370.

There has been no sea change in this body of law since Plaintiff's arrest in June 2004. As a result, the district court erred in finding Defendants protected by qualified immunity.

We note that on remand, after sufficient discovery, the district court quite obviously retains its discretion to entertain motions for summary judgment. Without the benefit of discovery, we express no opinion on the ultimate merits of Plaintiff's case. We simply find, having "scrutinized" Plaintiff's case "with special care," that the district court improvidently dismissed Plaintiff's claims. *See Gazette,* 41 F.3d at 1064. Accordingly, we reverse the district court's dismissal of Plaintiff's Fourth Amendment claims.

C. Qualified Immunity and Plaintiff's First Amendment Claims

Plaintiff additionally alleged violations of his rights under the First Amendment. Before the district court, Plaintiff denied asserting a First Amendment retaliation action. Rather, he claimed to challenge "Defendants' actions in removing him from the public sidewalk, when he had done nothing wrong, [as] a *per se* violation of his First Amendment freedoms." *Logsdon,* 2006 WL 1793243, at *4. As the district court correctly noted, Plaintiff's "First Amendment claims are grounded in the theory that his arrests impeded his freedom of expression and of assembly." *Id.* The district court therefore concluded that "[s]hould the arrests be supported by probable cause, then none of Plaintiff's constitutional claims survive." *Id.* Because the district court erred in granting Defendants' motion to dismiss Plaintiff's Fourth Amendment claims, the

district court's basis for dismissing Plaintiff's First Amendment claims is no longer valid. Examining Plaintiff's First Amendment claims *de novo,* with reference to other plausible theories, we reverse the district court's dismissal of Plaintiff's First Amendment claims.

We begin by considering whether Defendants violated Plaintiff's constitutional rights. *See Saucier,* 533 U.S. at 201. On appeal, Plaintiff does little to clarify how Defendants violated his First Amendment rights. Plaintiff does not argue that Defendants arrested him in retaliation for his exercise of speech, nor could he, having disavowed this argument before the district court.[7] Rather, Plaintiff cites *Frisby v. Schultz,* 487 U.S. 474 (1988) and *Pouillon v. City of Owosso,* 206 F.3d 711 (6th Cir. 2000), apparently in support of an argument that the state impermissibly regulated speech conducted in a public forum.

Frisby v. Schultz concerned a facial First Amendment challenge to a city ordinance that banned all picketing "'before or about' any residence." 487 U.S.

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[7] We note that, had Plaintiff asserted a claim that Defendants retaliated against him in response to his exercise of free speech, Plaintiff would have preserved yet another potentially favorable path to make out a First Amendment violation, or at least to survive motions for summary judgment. *See generally Center for Bio-Ethical Reform,* 477 F.3d at 820-24; *see also id.* at 823-24 (concluding that genuine issues of material fact remained as to officers' motivation in effecting a lengthy detention of pro-life activists); *McCurdy v. Montgomery County,* 240 F.3d 512, 520 (6th Cir. 2001) (arrest absent probable cause constitutes adverse action of sufficient consequence to form the basis of a retaliation claim).

at 476. There, the plaintiffs were abortion protestors who sought to picket on a public street in front of an abortion provider's home, and who were prevented from picketing after the city adopted the prohibitive ordinance. *Id.* The Supreme Court in *Frisby* analyzed the plaintiff's challenge under the public forum doctrine, first acknowledging that the ordinance restricted speech in a "traditional public forum" inasmuch as it prevented protest on public streets and sidewalks. *Id.* at 479-81. The *Frisby* court next observed that the appropriate level of scrutiny depends on whether the ordinance is content-neutral in marking the bounds of permissible speech. *Id.* at 481. Finding the city's ordinance to be content-neutral, the court went on to consider "whether the ordinance is 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication.'" *Id.* at 482 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983)). Construing the ordinance narrowly, the court ultimately upheld the ordinance, finding that it preserved adequate alternative channels of communication, and that it served the significant government interest of protecting residential privacy. *Id.* at 484.

In *Pouillon v. City of Owosso,* police arrested the plaintiff, an anti-abortion protestor, purportedly for "'refusing a lawful police order' to move, and 'obstructing passage to a public building.'" 206 F.3d 711, 713 (6th Cir. 2000). There, the plaintiff had been protesting abortion on the steps of city hall when officers instructed him to move because he "was obstructing entry to and egress from city hall." *Id.* at 714. Plaintiff refused. *Id.* Police then arrested him,

took him into custody, and subsequently booked and charged him under a city ordinance that prohibits interference with police in the conduct of their duties. *Id.* The plaintiff in *Pouillon* brought a § 1983 suit against the officers alleging violations of his First and Fourth Amendment rights. *Id.* at 713-14. With respect to his First Amendment claim, the plaintiff argued that in arresting him for refusing to move his protest off the city hall steps, "the officers' restriction of his freedom of speech, even if construed as a time, place, and manner regulation, was not a reasonable one." *Id.* at 714.

We concluded in *Pouillon* that the city hall steps were a traditional public forum and, accordingly, that "protest on the steps of city hall could not be prohibited altogether." *Id.* at 717. We then went on to consider "whether requiring [the plaintiff] to move to the sidewalk was a reasonable time, place, and manner restriction that . . . left open ample alternative channels of communication." *Id.* at 717-18. Because the plaintiff had previously been harassed while protesting on the streets, and allegedly had stopped protesting on the street for that reason, we found that a question of fact remained as to whether the requirement to move to the sidewalk left open ample alternative channels of communication to the plaintiff, or alternatively "inhibit[ed] his protest." *Id.* at 718. We additionally noted an open question of fact as to "whether [the plaintiff's] protest . . . was impeding access to city hall such that it was reasonable to require him to move." *Id.* at 717.

In the instant case, Plaintiff averred that he engaged in anti-abortion protest and counseling from

the public sidewalk and public park adjoining the CWS property, both quintessentially public fora. *See Perry Educ. Ass'n,* 460 U.S. at 45 ("[S]treets and parks . . . 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'") (quoting *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 515 (1939)). On the facts alleged in Plaintiff's complaint, Defendants each removed Plaintiff from the public fora, thereby causing him to cease his protest and counseling, ostensibly for violating Ohio's criminal trespass law. In public fora, "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n,* 460 U.S. at 46. Plaintiff's complaint alleges that Defendants each "[d]emonstrat [ed] a blatant bias against [Plaintiff] and in favor of doing whatever CWS wanted." (J.A. at 11, 13) Construing Plaintiff's complaint liberally, Plaintiff alleges that Defendants were motivated by the content of his speech in removing him from the public forum, and not by any purported criminal trespass. Accordingly, Plaintiff has stated a claim that Defendants violated his First Amendment rights by restricting his speech on the basis of content.

Next, we consider whether qualified immunity applies to the alleged First Amendment violation, and we specifically look to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202. It has long been the case that content-based regulations of the citizen's right to engage freely in speech in

quintessential public fora presumptively violate the First Amendment. *See Perry Educ. Ass'n,* 460 U.S. at 46; *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.") (internal citations omitted). The contours of the First Amendment public forum doctrine are sufficiently clear. Here, Defendants ostensibly arrested Plaintiff for violating Ohio's criminal trespass law. However, if instead, as Plaintiff appears to allege, Defendants arrested him because of the content of his speech, then Defendants acted in violation of the First Amendment in ways that should have been clear to a reasonable officer. Viewing the allegations in the light most favorable to Plaintiff, the district court erred in dismissing Plaintiff's First Amendment claims. We reverse because Plaintiff stated a claim, but express no opinion as to whether Plaintiff will ultimately succeed on his claim following discovery.

II. PLAINTIFF'S STATE LAW CLAIMS

A. Standard of Review

This Court reviews a district court's grant of a Rule 12(b)(6) motion *de novo,* as set forth in Section I.A, *supra. See Petty,* 478 F.3d at 345; *Bloch,* 156 F.3d at 677.

B. State Law Tort Claims

The district court held that Plaintiff's state law claims of false arrest, false imprisonment, and

malicious prosecution could not be sustained because each of those claims required a showing that Plaintiff had been unlawfully detained. We reverse the district court's dismissal of Plaintiff's state law claims.

We agree with the district court that each of those claims in some way required proof of unlawful detention. First, to succeed on a claim of malicious criminal prosecution, an Ohio claimant must show three elements: "(1) malice in instituting or continuing the prosecution, (2) *lack of probable cause,* and (3) termination of the prosecution in favor of the accused." *Trussell v. Gen. Motors Corp.*, 559 N.E.2d 732, syllabus (Ohio 1990) (emphasis added). Second, "[f]alse imprisonment occurs when a person confines another intentionally '*without lawful privilege* and against his consent within a limited area for any appreciable time, however short.'" *Bennett v. Ohio Dep't of Rehab. & Corr.*, 573 N.E.2d 633, 636 (Ohio 1991) (emphasis added). Third, the essential elements for a false arrest claim in Ohio are "indistinguishable from a claim for false imprisonment in that each claim requires proof that one was intentionally confined . . . *without lawful justification.*" *Evans v. Smith*, 646 N.E.2d 217, 225 (Ohio 1994) (emphasis added). Because we conclude that Plaintiff's complaint states a claim that Defendants unlawfully arrested Plaintiff, we reverse.

C. State Law Constitutional Claims

Finally, Plaintiff also alleged violations of the Ohio State Constitution in his complaint-specifically, of Article I, Sections 11 and 14. The district court below never squarely addressed Plaintiff's state constitutional claims. On appeal, Plaintiff merely

argues that if this Court finds Plaintiff stated a claim for violations of the U.S. Constitution, then the "state law claims" should be reinstated on remand. (Pl.'s Br. at 28) Article I, Section 11 of the Ohio Constitution is interpreted in lockstep with the First Amendment to the U.S. Constitution. *Eastwood Mall, Inc. v. Slanco,* 626 N.E.2d 59, 61 (Ohio 1994). Additionally, Ohio courts have read Article I, Section 14 of the Ohio Constitution "to protect the same interests and in a manner consistent with the Fourth Amendment to the United States Constitution." *State v. Andrews,* 565 N.E.2d 1271, 1273 n. 1 (Ohio 1991). As previously set forth, Plaintiff stated a claim against Defendants for violations of the First and Fourth Amendment. Accordingly, on remand, the district court should consider Plaintiff's contention that Defendants violated Article I, Section 11 and Article I, Section 14 of the Ohio Constitution.

CONCLUSION

For the above reasons, we REVERSE the district court's order and REMAND for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-4085

[Filed July 6, 2007]

JOSEPH MICHAEL LOGSDON, Plaintiff-Appellant,	)
v.	)
CHARLES HAINS and DANIEL MCSHANE, Defendants-Appellees.	)

Before: SUHRHEINRICH, CLAY, and ROGERS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with this Court's opinion

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 1:05-CV-00541

[Filed June 27, 2006]

JOSEPH MICHAEL LOGSDON,
Plaintiff,

v.

CHARLES HAINS, et al.,
Defendants.

ORDER

This matter is before the Court on Defendants Charles Hains and Daniel McShane's Motion to Dismiss and Memorandum in Support (doc. 6), Plaintiff's Memorandum Opposing Defendants' Motions to Dismiss (doc. 7), and Defendants' filing of state court transcripts (doc. 9). Also before the Court are Plaintiff's Motion for Order to Convert Defendants' Motion to Dismiss to a Proceeding for Summary Judgment and Publishing a Discovery Order (doc. 10), Defendants' Response in Opposition (doc. 12), and Plaintiff's Reply (doc. 14). Finally, before the Court are

Plaintiff's Motion for Leave to File a Supplemental Memorandum Addressing the Preclusion Argument in Defendants' Rule 12(b)(6) Motion (doc. 11) and Defendants' Response in Opposition (doc. 13). For the reasons indicated herein, the Court GRANTS Defendants' Motion to Dismiss and DISMISSES this matter from the Court's docket.

I. BACKGROUND

In his Complaint for Money Damages, Plaintiff, Joseph Logsdon ("Logsdon"), alleges ten causes of action against Defendant Cincinnati Police Officers Charles Hains and Daniel McShane in their individual capacities (doc. 1). Logsdon's claims arise from his arrests on two separate dates at Cincinnati Women's Services, a clinic that provides lawful abortions (Id.). Plaintiff Logsdon has for many years protested outside of local Cincinnati abortion clinics (Id.). He has a history of arrest and conviction related to his protests, usually for criminal trespass, for which he had eight prior convictions (Id.). Logsdon describes himself as a "regular presence" at the Cincinnati Women's Services clinic and acknowledges that "he has known for many years that he is not welcome on CWS property"(Id.).

A. The October 2003 Incident

On October 28, 2003, Plaintiff Logsdon was protesting on the public sidewalk in front of Cincinnati Women's Services and had placed a sign on a fence that borders the clinic's parking lot (Id.). It is undisputed that the clinic's director, Debi Jackson, removed the sign from the neighboring fence and walked toward the clinic, through the clinic's parking

lot, with the intention of throwing the sign away (Id.). Plaintiff claims that after repeatedly demanding that Jackson return his sign, Plaintiff walked into the clinic parking lot, took the sign away from Jackson, and returned to his sidewalk protest (Id.). Jackson then called the police (Id.). Defendant Officer Hains responded to the call, arrested Logsdon, and charged him with criminal trespass and disorderly conduct (Id.). Plaintiff remained in the Hamilton County Justice Center for approximately four hours and was released on bond (Id.).

Plaintiff's Complaint notes that Officer Hains was not present for the interaction between Jackson and Plaintiff, and that Hains did not, himself, witness a crime (Id.). In addition, Plaintiff contends that Officer Hains knew or should have known that Plaintiff Logsdon's entry onto the clinic's property was privileged (Id.). Further, Plaintiff claims that Officer Hains responded to a fellow protestor who attempted to tell Hains what she had seen with, "Tell it to the judge" (Id.).

B. The June 2004 Incident

On June 18, 2004, Plaintiff Logsdon was again protesting on the public sidewalk in front of the Cincinnati Women's Services clinic (Id.). According to the Complaint, Logsdon walked into the public park contiguous to the clinic's parking lot to talk, through the chain link fence separating the properties, to a woman who was in the clinic parking lot (Id.). Plaintiff claims that he did not, at any point during this exchange, enter the clinic property (Id.). Plaintiff Logsdon contends that someone from the clinic staff

called the police alleging that Plaintiff had trespassed onto clinic property and Defendant McShane responded to the call (Id.). According to the Complaint, Officer McShane, without a warrant, arrested Logsdon, placed him in handcuffs and transported him to the Hamilton County Justice Center, where he was charged with criminal trespass and remained in custody for approximately four hours until his release on bond (Id.). As before, Plaintiff Logsdon notes in his Complaint that the arresting officer was not present for the incident and had not himself witnessed a crime (Id.). In addition, Plaintiff contends that Officer McShane ignored the attempts of a fellow protestor to provide their account of what had transpired (Id.).

II. PROCEDURAL HISTORY

As a result of the October 2003 incident, Logsdon was tried for disorderly conduct and trespassing before Judge Lisa Allen of the Hamilton County Municipal Court.[1] Judge Allen denied Logsdon's repeated motions to dismiss the trespassing case against him, rejecting Logsdon's argument that his retrieval of his poster was privileged under the law. However, Judge Allen found Logsdon not guilty of disorderly conduct. On the trespassing conviction, Judge Allen fined Logsdon

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[1] The Court takes judicial notice of the cited proceedings, and the transcripts of the proceedings put into evidence by Defendants. *A.G. Reeves v. Weiss,* 119 F.2d 472, 474 (6th Cir. 1941) (Court may take judicial notice of proceedings in a related case).

$100 and court costs, placed him on probation, and ordered him to stay away from the clinic.[2]

Logsdon appealed his sentence. Judge Mark Painter, of the First Appellate District of the Ohio Court of Appeals, reversed Logsdon's trespassing conviction, finding that Plaintiff was privileged to enter the clinic property for the short time that he did in order to retrieve his sign. *Ohio v. Joseph Logsdon,* 160 Ohio App.3d 517, No. C-040405, 2005-Ohio-1875, (Ohio Ct. App., April 22, 2005). Judge Painter commented that the "whole matter was blown way out of proportion," and that the incident should have ended after the initial confrontation. *Id.*

The incident did not end then, nor was the conflict put to rest subsequent to Judge Painter's decision. Having successfully challenged his criminal conviction, Plaintiff filed the instant Complaint on August 16, 2005, challenging the legality of his arrests both in October 2003 and June 2004, seeking monetary damages and attorney fees (doc. 1). Plaintiff alleges that Defendant Officers denied him his federal and state constitutional free speech rights, his federal constitutional right to assembly, his federal and state constitutional rights to be free from unreasonable search and seizure, and are liable to him for false

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[2] Judge Allen sentenced Logsdon on June 1, 2004, but stayed execution pending appeal. Despite the stay of the sentence, Judge Allen told Defendant, "I just want you to stay away [from the clinic]." Defendant obviously interpreted the stay of his sentence to permit him to return to the clinic, where some seventeen days later Officer McShane arrested him.

arrest, false imprisonment, and malicious prosecution (Id.).

On December 8, 2005, Defendants Hains and McShane filed the present Motion to Dismiss, arguing that Plaintiff has failed to state a claim upon which relief may be granted, that Defendants are entitled to qualified immunity from suit on the federal claims and to statutory immunity on the state claims (doc. 6). Plaintiff filed his Memorandum in Opposition to Defendants' Motion to Dismiss (doc. 7).

III. APPLICABLE LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) requires the Court to construe the complaint in the light most favorable to the plaintiff, *Block v. Ribar,* 156 F.3d 673, 677 (6th Cir. 1998), accept as true all the Complaint's factual allegations, *Broyde v. Gotham Tower, Inc.,* 13 F.3d 994, 996 (6th Cir. 1994), and determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See also Ziegler v. IBP Hog Mkt., Inc.,* 249 F.3d 509, 511-12 (6th Cir. 2001). A court's decision to grant a motion to dismiss may not be based upon a disbelief of the Complaint's factual allegations. *Miller v. Currie,* 50 F.3d 373, 377 (6th Cir. 1995) (courts should neither weigh evidence nor evaluate the credibility of witnesses). Instead, in its scrutiny of the complaint, the Court must construe all well-pleaded facts liberally in favor of the party opposing the motion. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974) (overruled on other grounds). Indeed, "[a] court may dismiss a complaint only if it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). The question before the Court considering a motion to dismiss is "not whether [the] plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

The admonishment to liberally construe the plaintiff's claim when evaluating a Rule 12(b)(6) dismissal does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice and Procedure: § 1357 at 596 (1969)." In practice, a complaint . . . must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1106 (7th Cir. 1984) *(quoting In Re: Plywood Antitrust Litigation,* 655 F.2d 627, 641 (5th Cir. 1981)).

IV. DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiff's Complaint on the following grounds: (1) Plaintiff's failure to plead a federal constitutional claim; (2) the Officers' assertion that they are entitled to qualified immunity from suit; (3) issue preclusion; (4) lack of justification for pendent jurisdiction; and (5) failure to adequately plead state tort claims (doc. 6).

A. Defendants' Attack on Plaintiff's Constitutional Claims

Plaintiff Logsdon claims that his Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures were violated when the two officers arrested him without a warrant (doc. 1). As a result of his arrests, he alleges he was prevented from continuing his protest on October 28, 2003, and June 18, 2004; thus giving rise to a violation of his First Amendment rights to freedom of speech and freedom of assembly (Id.).

Defendants argue that Plaintiff fails to allege a First Amendment retaliation claim, as the officers were alleged merely to have responded to telephone calls, and the officers are not alleged to have acted with malice (doc. 6). Defendants further argue that the Complaint fails to allege that the officers arrested Logsdon without probable cause (Id.). Defendants argue that Plaintiff is precluded from relitigating the issue of lack of probable cause before this Court based on the fact that Logsdon's motion to dismiss the trespassing case against him was litigated before the state court judge, and denied (Id.).

Plaintiff responds that he has not alleged retaliation for First Amendment activity, but rather has simply alleged that Defendants' actions in removing him from the public sidewalk, when he had done nothing wrong, was a *per* se violation of his First Amendment freedoms in violation of clearly established law (doc. 7). Plaintiff further argues that the two arrests were unreasonable and unsupported by probable cause (Id.). He argues Defendants witnessed

no crimes, and deliberately disregarded the testimony of other protesters (Id.). Plaintiff argues that Defendants' citation to the transcript from the state court proceeding "goes outside the record and beyond the allegations in the Complaint by flirting with a preclusion argument with respect to 'probable cause'" (Id.).

1. The Trial Court Did Not Consider the Issue of Probable Cause.

Although the state trial court denied Logsdon's motion to dismiss the criminal complaint against him, therefore giving credence to the propriety of the October 2003 arrest, the state trial court never explicitly addressed the question of probable cause. The issue of probable cause was not actually litigated, and no state court issued a final decision on the specific question. *Hollins v. Massanari,* 49 Fed. Appx. 533, 535 (6th Cir. 2002) (issue preclusion only applies if "the issue was actually litigated and decided in the prior action") *(quoting Hammer v. Immigration and Naturalization Serv.,* 195 F.3d 836, 840 (6th Cir. 1999)). The court's review in the state matter pertained to Logsdon's actions and not those of the arresting officers. For this reason the Court does not find that issue preclusion is applicable here.

2. Plaintiff's Claims Turn on Probable Cause

All of Plaintiff's present claims arise from the alleged impropriety of his arrest. His Fourth Amendment claims clearly relate to his arrests, and his First Amendment claims are grounded in the

theory that his arrests impeded his freedom of expression and of assembly. Should the arrests be supported by probable cause, then none of Plaintiff's constitutional claims survive. Having reviewed this matter, the Court finds the arresting officers, in relying on testimony of a reliable witness and finding Logsdon at the scene of the alleged trespass, reasonably believed that Plaintiff committed trespass. Accordingly the Officers had probable cause.

"A police officer has probable cause if there is a fair probability that the individual to be arrested has either committed or intends to commit a crime." *Fridley v. Horrighs,* 291 F.3d 867, 872 (6th Cir. 2002) (internal quotation and citations omitted). Officers determine the existence of probable cause based on the facts and circumstances that are both within their knowledge at the time of the arrest and are sufficient to inform a "prudent person, or one of reasonable caution," that the suspect "has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979). The law accepts the risk that officers may stop and even arrest the innocent. *Illinois v. Wardlow,* 528 U.S. 119, 126 (2000). "Indeed the Fourth Amendment accepts that risk . . . persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent."*Id.* Finally, a warrantless arrest for a misdemeanor does not violate Fourth Amendment rights where probable cause is established. *Atwater v. City of Lago Vista,* 532 U.S. 318, 354 (2001).

3. The October 2003 Incident: Plaintiff's Entry Ultimately Determined Privileged

Plaintiff argues Defendant Hains improperly arrested him in October 2003, for trespass, by failing to listen to the testimony of his fellow protesters and for failing to ascertain that his entry onto the clinic property was privileged. In Ohio, criminal trespass, a fourth degree misdemeanor, is codified in the Ohio Revised Code Section 2911.21, providing in relevant part that "No person, without privilege to do so, shall . . . [k]nowingly enter or remain on the land or premises of another." Privilege encompasses "immunity . . . growing out of necessity." Ohio Rev. Code § 2901.01.

The Court finds two Sixth Circuit cases instructive here. First, in *Estate of Dietrich v. Burrows,* 167 F.3d 1007 (6th Cir. 1999), the court held that the arresting officers did not have probable cause when they knew of "facts and circumstances that conclusively established, at the time of [the arrest]" that the suspect had an affirmative defense to the crime for which he was detained. *Id.* at 1012. Next, in *Painter v. Robertson,* 185 F.3d 557 (6th Cir. 1999), the court held that determinations of probable cause include "facts and circumstances establishing a statutorily legitimated affirmative justification for the suspected criminal act ." *Id.* at 570, citing *Dietrich,* 167 F.3d at 1013-14. However, the *Painter* court made two critical clarifications about its holding: first, it held that an officer "may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification." *Id.* at 571. Second, the

court stated in a footnote that it was emphatically not requiring

> that law enforcement operatives should conduct quasi-trials as a necessary predicate to the warrantless arrests of perpetrators . . . Rather, this court . . . merely resolves that, where a reasonable officer would conclusively know that an investigative target's behavior is protected by a legally cognizable affirmative defense, that officer lacks a legal foundation to arrest that person for that behavior (Id. at n. 21).

Thus, as noted by the Sixth Circuit, "it is clear that a police officer is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense." *Fridley,* 291 F.3d at 873. Indeed, and relevant here, the court held that "[e]ven if circumstances suggest that a suspect may have an affirmative defense, if a reasonable officer would not 'conclusively know' that the suspect is protected by the defense, then he is free to arrest the suspect provided that there is probable cause to do so." *Id.*

Thus, the inquiry becomes whether Officer Hains had probable cause to arrest Logsdon based on the phone call from the clinic and whether a reasonable officer would "conclusively know" that Logsdon would be protected against a charge of criminal trespass with a defense of privilege to enter to recover his property.

The Court finds under the circumstances presented here, Officer Hains had probable cause to arrest Logsdon based on the phone call from the clinic. Where a citizen-informant is also the apparent victim of a

crime in question, her report is entitled to great weight when determining the existence of probable cause. *See, e.g., Adams v. Williams,* 407 U.S. 143, 147 (1972) (information provided to police by victims of crime should not be thwarted by "subtleties of the hearsay rule"); *Ahlers v. Schebil,* 188 F.3d 365, 370 (6th Cir. 1999) ("An eyewitness identification will constitute sufficient probable cause unless, at the time of the arrest, there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation."). In 2003, the Sixth Circuit observed that the court "has consistently upheld arrests that were predicated upon witness identifications." *Banks v. Kentucky State Police,* 57 Fed .Appx. 242 (6th Cir. 2003) (finding "ample probable cause" for arrest of suspect for domestic violence based on call from victim). Here the facts and circumstances within Officer Hain's knowledge were sufficient to lead a person of reasonable caution to conclude Plaintiff had trespassed. Officer Hains responded to a call for help at a location that has been the target of trespass offenders, including Plaintiff, on numerous occasions. Officer Hains was not responding to an anonymous tip, and there was no question Plaintiff had been on the property. Officer Hains was not unreasonable in concluding that Plaintiff had trespassed.[3]

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[3] See, *United States of America v. Reed,* 220 F.3d 476 (6th Cir. 2000), where the Defendant argued, in reliance on *Washington v. Blair,* 827 P.2d 356 (Wa. 1992), that the officers needed to have concluded prior to the arrest for trespassing whether he was privileged to enter or remain on the property. *Id.* at 479. The

Should Officer Hains have conclusively known that Logsdon' s trespass was privileged under common law principles? The Court cannot impose such a burden on the Officer here, as even the state trial court judge erred on the question. Privilege encompasses "immunity . . . growing out of necessity." Ohio Rev. Code § 2901.01. A reasonable officer might have found it not a necessity for Logsdon to retrieve his poster. Officer Hains was entitled to give little credence to Logsdon's fellow protestors and encourage them to take their testimony to the judge. Hains had a legal foundation for the arrest based on probable cause, and Hains was not required to conduct a quasi-trial in order to determine that Logsdon's trespass was technically privileged.

Sixth Circuit rejected the reasoning of *Washington,* finding that it "was based upon a requirement negating the affirmative defense of privilege prior to arresting a person for trespass. *This Circuit does not require such an added inquiry to the probable cause determination." Id.* (emphasis added). Judge Gilman, in his dissent, took issue with this characterization of the Washington state decision and presented Virginia and Maryland state court decisions to support his interpretation that the requirement was, instead, that the officer must have "probable cause to believe that the defendant was on the property without a legitimate purpose at the time of his arrest." *Id.* at 480-81. Interestingly, however, Judge Gilman presented a hypothetical scenario that serves to bolster Officer Hains's position in the instant case: "[L]et us assume that [the] apartment manager had informed the officers that Reed was trespassing. The officers would then have had probable cause to arrest Reed for criminal trespass. . . . [They] would have had probable cause to arrest and would not have had to dispel every innocent explanation." *Id.* at 482.

For these reasons, the Court concludes that Plaintiff fails to state federal constitutional claims against Officer Hains.

4. The June 2004 Incident

The June 2004 incident presents a closer case. In this incident, Logsdon did not actually enter the property. Officer McShane responded to a call for help from the clinic alleging that Logsdon had trespassed. McShane found Logsdon near the clinic, gave credence to the clinic's charge that Logsdon trespassed, and arrested Logsdon.

Taking into consideration the facts and circumstances in Officer McShane's knowledge that day, the Court again concludes that his actions were not objectively unreasonable, although McShane was ultimately mistaken. McShane, like Hains, confronted circumstances in which a repeat offender was near the premises again. The Court does not find that McShane was objectively unreasonable in granting credence to the phone caller over Logsdon. As the *Wardlow* Court indicated, officers may arrest innocent people and still be within the law. *Illinois v. Wardlow,* 528 U.S. 119, 126 (2000). This is one such case.

B. Defendants Invoke the Doctrine of Qualified Immunity

Officers Hains and McShane assert that they are entitled to qualified immunity against the federal claims lodged by Plaintiff (doc. 6). Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are

shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). The focus of the inquiry is "whether the officer had fair notice that her conduct was unlawful" and the concept of reasonableness "is judged against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004)

The Sixth Circuit utilizes a three-part test to analyze claims of qualified immunity: whether the facts, viewed in the light most favorable to the plaintiff, demonstrate that a constitutional or statutory violation has occurred; whether the violation concerned a clearly established right of which a reasonable person would have known; whether the plaintiff has offered sufficient evidence to indicate that the alleged act was objectively unreasonable in light of the clearly established constitutional or statutory right. *Feathers v. Aey,* 319 F.3d 843, 848 (6th Cir. 2003).

The Court first must address whether Plaintiff Logsdon has alleged facts which, when viewed in the light most favorable to him, demonstrate the Officers' conduct violated his First and Fourth Amendment rights. As indicated above, the viability of Plaintiff's claims relies on whether the Officers had probable cause to arrest him. The Court has already found that both Officer Hains and McShane had probable cause. As such, the facts do not show that a constitutional violation has occurred.

However, even if the Court has erred in such determination, the Court is confident that a reasonable officer would not necessarily have understood that arresting Logsdon would amount to a constitutional violation, and Plaintiff has failed to offer evidence showing that his arrest was objectively unreasonable." Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Id. citing Saucier v. Katz,* 533 U.S. 194, 206 (2001). Here, Officer Hains was clearly reasonable in arresting Logsdon, as evidenced by the state trial court's decision that in no way threw into question the validity of the arrest and which actually found Logsdon guilty of trespassing. As for Officer McShane, the case is closer, but at worst, McShane reasonably misapprehended the law governing the circumstances he discovered. Indeed his arrest of Logsdon may even fall within the "hazy border" between the permitted and proscribed, but as such, it is not a clearly established violation, and McShane is entitled to qualified immunity.

C. Plaintiff's State Law Claims

Having thus dismissed Plaintiff's federal claims, the Court finds that its conclusion that Defendants had probable cause to arrest Logsdon similarly results in the disposition of his state law claims for false arrest, false imprisonment, and malicious prosecution. *Trussell v. General Motors Corp,* 53 Ohio St.3d 142, 559 N.E.2d 732 (Ohio, 1990) (lack of probable cause necessary element of the tort of malicious prosecution); *Bennett v. Ohio Dept. Of Rehabilitation and Correction,* 60 Ohio St.3d 107, 109, 573 N.E.2d 633

(Ohio, 1991) (claim for false imprisonment requires showing of confinement without lawful privilege); *Barnes v. Meijer Dept. Stores,* No. CA2003-09-246, 2004 Ohio App. LEXIS 1528, *8 (Ohio Ct. App., April 5, 2004) (elements for false imprisonment and false arrest are the same, both require showing of the unlawfulness of the detention). Defendants lawfully arrested Logsdon based on their finding of probable cause that he had trespassed.

V. OTHER PENDING MOTIONS

This Order dismissing the case addresses the issues raised by Plaintiff in both his Motion for Order to Convert Defendants' Motion to Dismiss to a Proceeding for Summary Judgment and Publishing a Discovery Order (doc. 10), and his Motion for Leave to File a Supplemental Memorandum Addressing the Preclusion Argument in Defendants' Rule 12(b)(6) Motion (doc. 11). As for the former motion, the Court took judicial notice of the trial court transcript and sentencing, which effectively resulted in its disposition; as for the latter, the Court rejected Defendant's Preclusion argument. In any event, the dismissal of this case terminates these pending motions.

VI. CONCLUSION

Having reviewed this matter, the Court finds that Plaintiff has not adequately alleged a constitutional claim under any theory because the officers had probable cause to arrest him for trespassing. The Court further finds the Defendants are entitled to qualified immunity, as Plaintiff has not alleged a

clearly established constitutional violation under the facts of this case.

Plaintiff is a regular at the clinic. Plaintiff is an admitted chronic trespass offender. The reality is that his actions set up the course of events underlying his Complaint. The Court is not disposed to serve as a forum for a litigant who sets up a conflict situation, and then seeks to benefit from it by suing law enforcement officers who arrive on the scene to ensure order.

Accordingly, for the reasons indicated herein, the Court GRANTS Defendants' Motion to Dismiss (doc. 6), DENIES Plaintiff's Motion for Order to Convert Defendants' Motion to Dismiss to a Proceeding for Summary Judgment and Publishing a Discovery Order (doc. 10), and DENIES AS MOOT Plaintiff's Motion for Leave to File a Supplemental Memorandum Addressing the Preclusion Argument in Defendants' Rule 12(b)(6) Motion (doc. 11).

SO ORDERED.

Dated: June 27, 2006

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case Number: 1:05-cv-00541

[Filed June 27, 2006]

JOSEPH MICHAEL LOGSDON Plaintiff(s)	)
v.	)
CHARLES HAINS, et al. Defendant(s)	)

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . the Court GRANTS Defendants' Motion to Dismiss (doc. 6), DENIES Plaintiff's Motion for Order to Convert Defendants' Motion to Dismiss to a Proceeding for Summary Judgment and Publishing a Discovery Order (doc. 10), and DENIES AS MOOT Plaintiff's Motion for Leave to File a Supplemental Memorandum Addressing the Preclusion Argument in Defendants' Rule 12(b)(6) Motion (doc. 11).

6/27/06

James Bonini, Clerk

s/Kevin Moser
Kevin Moser
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4085

[Filed December 13, 2007]

JOSEPH MICHAEL LOGSDON,
Plaintiff-Appellant,

v.

CHARLES HAINS AND
DANIEL MCSHANE
Defendants-Appellees.

ORDER

BEFORE: SUHRHEINRICH, CLAY, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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(2)

No. 07-1189

FILED
JUN 2 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

CHARLES HAINS and DANIEL MCSHANE,
Petitioners,

v.

JOSEPH MICHAEL LOGSDON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONERS

Does the accusation of a known, credible victim establish probable cause to arrest?

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This statement of facts mirrors the allegations in the Complaint and is consistent with the two state court transcripts that the District Court admitted into the record as part of this Civil Rule 12(b)(6) proceeding.

1. Logsdon's Commitment To His Pro-Life Message.

Respondent Joseph Michael Logsdon has a long history of pro-life activism, spending countless hours on the public sidewalks outside of local abortion clinics peacefully protesting against abortion and counseling women against having abortions. Mr. Logsdon has never threatened or committed any acts of violence in the course of his activism, though on some occasions during the past 15 years he has walked onto abortion clinic property, risking arrest and prosecution, in order to communicate with pregnant women and others to persuade them of the evils of abortion and the value of every human life. When prosecuted and/or convicted of *Criminal Trespass* for such activity, Mr. Logsdon has always treated judges and prosecutors with respect, served his sentences with dignity, and complied with any related court orders.

2. Mr. Logsdon's October 2003 Arrest By Petitioner Hains.

On October 28, 2003, Mr. Logsdon was present on the public sidewalk outside of Cincinnati Women's

Services (CWS), a Cincinnati abortion clinic, engaging in his usual protest and counseling activities. As he often did, Mr. Logsdon placed a pro-life sign on a fence that belonged to the neighboring property and abutted the CWS parking lot. The sign read: "GOD HAS A PLAN FOR YOUR BABY", and listed a telephone number that women could call for help.

Without any provocation except for the alleged complaint of a CWS patient and her own disapproval of the message on Mr. Logsdon's sign, CWS President Debi Jackson ("Jackson") removed the sign from the neighbor's fence and walked toward the CWS clinic with the intention of destroying it. From his position on the public sidewalk, Mr. Logsdon verbally challenged Jackson's theft of the sign and repeatedly demanded that she return it to him. When she refused to do so, Mr. Logsdon walked onto clinic property to confront Jackson, took the sign back from her, and returned immediately to the public sidewalk. Mr. Logsdon committed no act of violence and stayed on CWS property only long enough to recover his stolen sign.

Jackson's theft of Mr. Logsdon's sign created a legal privilege for him to enter CWS property in order to retrieve it, so that as a matter of law Mr. Logsdon committed neither *Criminal Trespass* nor any other crime while on CWS property. Yet, Jackson proceeded to call City of Cincinnati police to report that Logsdon had committed a crime.

Petitioner Hains responded to Jackson's call and arrested Mr. Logsdon even though Hains had obtained no warrant for Mr. Logsdon's arrest, was not present

during the sign incident, had witnessed no crime, and knew or should have known – based upon facts readily available to him - that Mr. Logsdon's conduct was legally privileged and that Jackson was the wrongdoer. More importantly, Defendant Haines deliberately disregarded facts that were readily available to him and which established Mr. Logsdon's innocence, cutting off the attempted explanation of another witness/sidewalk counselor with the comment: "Tell it to the judge."

Demonstrating a blatant bias against Mr. Logsdon in favor of whatever CWS wanted, and ignoring the fact that Jackson had committed the only crime at the scene, Defendant Hains arrested Mr. Logsdon, transported him to the Hamilton County Justice Center and filed criminal charges against him alleging *Criminal Trespass* and *Disorderly Conduct* (non violent misdemeanors under Ohio law). Mr. Logsdon was detained in the Hamilton County Justice Center for four hours before being released.

After a bench trial in the Hamilton County Municipal Court, Mr. Logsdon was found guilty of *Criminal Trespass* but not guilty of *Disorderly Conduct*. Mr. Logsdon appealed the *Criminal Trespass* conviction, which was reversed and vacated by the First Appellate District of Ohio on April 22, 2005.[1]

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[1] *State v. Logsdon*, 2005-Ohio-1875, 160 Ohio App.3d 517.

3. Mr. Logsdon's June 2004 Arrest By Petitioner McShane.

On June 18, 2004, Mr. Logsdon was again present on the public sidewalk outside of CWS, engaging in his usual protest and counseling activities. At one point, Mr. Logsdon decided to speak with a woman who had arrived by car in the CWS parking lot. Rather than attempting to speak to the woman from the distant public sidewalk, Mr. Logsdon elected to walk into the public park that abuts the CWS parking lot and to speak to the woman through a chain link fence. During the entire conversation, Mr. Logsdon remained in the public park, after which he returned to the public sidewalk.

In spite of the fact that Mr. Logsdon never entered CWS property, someone at CWS called the Cincinnati police alleging that he had trespassed. Petitioner McShane responded to the call and promptly arrested Logsdon even though he had obtained no warrant for Logsdon's arrest, was not present during the incident, had witnessed no crime, and nothing resembling a crime had occurred. In fact, McShane deliberately disregarded facts that were readily available to him and which established Logsdon's innocence, ignoring the attempted explanation of another sidewalk counselor who was present.

Petitioner McShane demonstrated a blatant bias against Mr. Logsdon and in favor of doing whatever CWS wanted. Petitioner McShane arrested Logsdon, transported him to the Hamilton County Justice Center, and filed a criminal charge against him for *Criminal Trespass* (a non violent misdemeanor under

Ohio law.) The *Criminal Trespass* charge was later dismissed without trial.

Mr. Logsdon suffered damages as a direct and proximate result of both arrests.

4. State Court Transcripts.

As noted above, the Petitioners filed with the District Court two transcripts from the state court prosecution of Mr. Logsdon relative to the October 2003 arrest by Petitioner Hains. However, neither transcript contains any testimony by Hains or any mention of him. They therefore add nothing to the body of facts governing this appeal regarding (i) what Hains understood about the incident before or after he arrested Mr. Logsdon, or (ii) why Hains could have believed that he had probable cause to arrest Mr. Logsdon.

Neither state court transcript relates to Mr. Logsdon's June 2004 arrest by Defendant McShane.

B. Procedural Background.

On August 16, 2005, Mr. Logsdon filed a *Complaint For Money Damages* in the United States District Court for the Southern District of Ohio against Petitioners Hains and McShane, asserting five causes of action against each: federal claims for First and Fourth Amendment violations and three related state law claims.

On December 8, 2005, Petitioners filed a motion to dismiss under Civil Rule 12(b)(6), which the District

Court granted on June 27, 2006. Mr. Logsdon appealed.

On July 6, 2007, the United States Court of Appeals for the Sixth Circuit reversed the dismissal of the District Court and remanded the case for further proceedings. Petitioners' motion for rehearing en banc was denied on December 13, 2007.

REASONS FOR DENYING THE WRIT

The Petition fails to present any issue that meets the jurisdictional requirements under Supreme Court Rule 10.

1. The Petition Miscasts an Issue of Fact.

The first reason for denying the writ is that Petitioners have cast their issue to the Court with an unwarranted factual assertion that both triggers the admonition in Supreme Court Rule 15.2 and violates the mandate of Civil Rule 12(b)6).

Specifically, the Petition asserts a "probable cause" issue involving a "known, credible victim," when nothing in this record suggests that Petitioners knew the alleged "victim" at all. Moreover, nothing in this record speaks to the credibility of the alleged victim. Rather, Petitioners have fabricated that characterization as they grasped for an appeal issue in violation of Civil Rule 12(b)(6), which requires the Court to "construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The Court must

liberally construe the complaint in favor of the party opposing the motion, *Kugler v. Helfant*, 421 U.S. 117, 125-26 n.5 (1975), not entertain self-serving fabrications of the moving party.

On remand Petitioners will have an opportunity to develop their "probable cause" argument with whatever witnesses they can produce, but there is no basis at this stage of the case for discussing police reliance on witnesses, credible or otherwise, until there is something in the record to establish what and whom the Petitioners knew at the time of the arrests.

The Petition must be denied if only because the factual underpinning of the issue presented is itself a fabrication.

2. The Petition Cites Only Inapposite Case Law That Does Not Present A Conflict Between Circuit Courts.

The second reason for denying the writ is that Petitioners have cited no case law that suggests a conflict in the circuit courts.

A police officer may arrest a person if he has probable cause to believe that the person committed a crime. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Probable cause exists where the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Draper v. United States*, 358 U.S. 307, 313 (1959).

The facts of this case are that Petitioners arrested Mr. Logsdon without a warrant, on separate occasions, while deliberately disregarding readily available evidence of his innocence. The only two cases cited by Petitioners involve Fourth Amendment issues far removed from the facts of this case.

Both *Wilson v. Russo*, 212 F.3d 781 (3rd Cir. 2000) and *Beauchamp v. City of Noblesville, Ind.*, 320 F.3d 733 (7th Cir. 2003), involved police conduct (i) in obtaining arrest warrants, (i) when the identification of the perpetrator was in doubt, and (iii) when the police failed to disclose certain inculpatory facts while seeking the warrant. This case, on the other hand, involves (i) police refusal to listen to Mr. Logsdon's version of the events, (ii) before making a warrantless arrest, (iii) when the question was not about a perpetrator's identity but rather whether any crime had been committed at all.

Moreover, both *Wilson* and *Beauchamp* support Mr. Logsdon's position, as reinforced by the Sixth Circuit, that a probable cause analysis requires police to consider all available information:

> Independent exculpatory evidence or substantial evidence of the witness's own unreliability that is known by the arresting officers could outweigh the identification such that probable cause would not exist. *Each case must therefore be examined* on its own facts.

Wilson at 790 (emphasis added). A police officer cannot examine facts if he refuses to hear about them.

Likewise:

> The complaint of a single witness or putative victim alone generally is sufficient to establish probable cause to arrest unless the complaint would lead a reasonable officer to be suspicious, in which case the officer has a further *duty to investigate.*

Beauchamp at 743 (emphasis supplied).[2]

The foregoing passages are completely consistent with the Sixth Circuit's observation that because Petitioners "deliberately disregarded available evidence [they] failed to reasonably formulate probable cause." Appendix to Petition, p. 15a.

Not only, therefore, are the facts of *Wilson* and *Beauchamp* distinguishable from the alleged facts in this case and insufficient to create a true conflict, but Wilson and Beauchamp recognize the very principles upon which the Sixth Circuit's decided this case. As the Sixth Circuit stated elsewhere, "police officers may not 'make hasty, unsubstantiated arrests with impunity,' nor 'simply turn a blind eye toward potentially exculpatory evidence known to them in an

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[2] This Court no doubt recognizes that conflicts between abortion clinics and pro-life activists on nearby sidewalks are highly polarized situations. It is difficult to imagine any reasonably trained police officer believing that he could determine probable cause in such a situation by listening to only one side of the dispute.

effort to pin a crime on someone." *Radvansky v. City of Olmsted* Falls, 395 F.3d 291, 305 (6th Cir. 2005).

CONCLUSION

For all of the foregoing reasons, and for the reasons articulated in the Sixth Circuit's decision below, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 07-1189

In The
Supreme Court of the United States

CHARLES HAINS and DANIEL MCSHANE,
Petitioners,

v.

JOSEPH MICHAEL LOGSDON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

The brief in opposition presents two flawed arguments.

First, the Petition does not miscast an issue of fact. Respondent argues that nothing in the record suggests that the victim was either known or credible. This is not true.

The record shows that the victim who called the police was known. The complaint alleges that Debi Jackson, the CWS clinic director, reported the first incident. The complaint provides that another employee of CWS reported the second incident. These were not anonymous calls by unidentifiable persons. Rather, the callers identified who they were and where they were calling from (CWS).

The respondent argues that nothing in the record speaks to the credibility of the victim at all. But in both incidents the callers identified the suspect and informed the police of his presence at CWS. When the police arrived, the suspect was present. This corroborated the reports and spoke to the credibility of the victim.

In a footnote, Respondent offers that conflicts between abortion clinics and pro-life activists on nearby sidewalks are highly polarized situations. This is true. But then he concludes that a reasonably trained police officer could not determine probable cause in such situations by listening to only one side of the story. We disagree. When a known, credible victim calls the police to report a crime, probable cause exists

at that moment. Probable cause is simply a probability that a crime has been committed, not a certainty. Where a known, credible victim reports a crime, law enforcement should be permitted to rely on that report to make an arrest.

Second, there is conflict and confusion among the courts on the issue of probable cause.

By way of example, in *Brodnicki v. City of Omaha* a nine-year-old victim provided police with a description of a potential abductor and the license plate of his car. Police traced the license plate to Brodnicki, showed him to the girl, and she identified him as the man who tried to abduct her. Brodnicki denied that he tried to abduct the girl and offered an alibi. He asserted that the police had an obligation to investigate his alibi before making an arrest. The Eighth Circuit disagreed: "The officers were not required to conduct a mini-trial before arresting Brodnicki." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996). The police received the report of a known, credible victim: they had no duty to further investigate.

Unlike the *Brodnicki* and other courts, the Sixth Circuit would require the police to conduct a trial-type investigation prior to making an arrest. Here, an employee and the clinic director of CWS called the police to report a crime—criminal trespassing. The employee and clinic director of CWS provided identification of the suspect. Furthermore, they indicated he was still present on the sidewalk in front of the property. The police responded to the scene. When they arrived, they discovered Logsdon where he

was reported to be. As a result, the officers had the report of a known, credible victim of an alleged crime. The officers had probable cause to arrest. They should not be required to conduct a mini-trial to weigh the credibility and veracity of the two "highly polarized" sides.

Resolving this case will mark a brighter line for law enforcement officers. When a known, credible victim reports a crime, law enforcement should not be required to conduct a mini-trial before making an arrest.

Respectfully submitted,

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